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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 561

LOCAL FINANCE CORPORATION, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW AND JURISDICTION

The opinions below and the basis for this Court's jurisdiction are as set forth in the petition and in the Commissioner's protective petition in *Commissioner* v. *Guardian Agency, Inc. and Beneficial Insurance Agency*, No. 390, pending this Term.

QUESTION PRESENTED

Whether, in the particular circumstances of this case, the Commissioner's allocation to Local Finance Corporation and its subsidiaries, pursuant to Section 482 of the Internal Revenue Code of 1954, of one-

half of the income from credit life insurance premiums paid by their borrowers to corporations controlled by their shareholders, was correctly sustained by both courts below as neither arbitrary nor unreasonable.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the petition at pp. 3-5.

STATEMENT

This is a consolidated income tax case for the years 1958 through 1962 involving Section 482 of the Internal Revenue Code. Section 482 empowers the Commissioner of Internal Revenue to allocate income among business enterprises controlled by the same interests "if he determines that such * * * allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such * * * businesses." Petitioners are a parent corporation and its wholly-owned subsidiaries all of which operated as finance companies in Indiana. Stockholders who owned in excess of 70 percent of the stock of petitioner Local Finance Corporation (the parent finance company), owned 100 percent of Guardian Agency, Inc. ("Guardian"), a general insurance broker. Beneficial Insurance Agency, Inc. ("Beneficial") is the wholly-owned subsidiary of Guardian. (Pet. (No. 390) App. A 8-9.)[1]

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[1] "Pet. (No. 390)" references are to the Commissioner's protective petition for certiorari in *Commissioner* v. *Guardian Agency, Inc. and Beneficial Insurance Agency, Inc.*, No. 390, pending this Term.

In connection with the loans made by petitioners, single premium credit life insurance was offered to their borrowers. The insurance was sold by petitioners' employees who prepared the necessary papers. Before 1954, the insurance was issued by an independent life insurance company which retained (after payment of death claims and expenses) 9.5 percent of the premiums and paid Guardian a commission roughly equal to one-half of the premiums. Beginning in January, 1954, the commissions were paid to an officer of Guardian who assigned the commission income to Guardian which, together with Beneficial and Local Finance, performed most of the accounting duties incident to the sale of the insurance. After adjustments for contingent commissions, Guardian retained approximately 56 percent of the premiums. (Pet. (No. 390) App. A. 9-10).

After June 30, 1958, a new arrangement was devised whereby Grand National Life Insurance Company ("Grand National") was organized under the laws of Arizona. Ninety-nine percent of the stock of Grand National was owned by shareholders of Guardian. Grand National thereupon entered into a reinsurance agreement with the independent insurance company which had previously issued the credit life insurance for borrowers from Local Finance. This reinsurance agreement provided that Grand National was to pay death claims out of the 90.5 percent of the premiums it was to receive; the independent insurer was to receive the remaining 9.5 percent of the premiums. Under the new arrangement, there was little or no change in the procedures

followed in the sale of credit life insurance by the petitioner finance companies. Employees of Local Finance and its subsidiaries continued to sell the insurance and prepare the necessary papers, and employees of Guardian and Beneficial continued to perform certain of the accounting duties incident to the sale of the insurance. Grand National conducted no activity other than contracting for reinsurance of the credit life insurance. It had no salaried employees other than an attorney who served as office manager for $20 per month. Its office consisted of space in a room in the law offices of its office manager. As under the previous arrangement, the supervision and payment of all claims were handled by the independent insurance company. During the period July 1, 1958, to December 31, 1962, Grand National retained about 58 percent of the total premiums after the payment of death claims and expenses. A substantial portion of the retained amounts were paid as dividends to its shareholders, who owned in excess of 70 percent of the stock of petitioner finance companies. (Pet. (No. 390) App. A 10; App. C 36, 39.)

Acting under Section 482, the Commissioner allocated one-half of the premium income to petitioner and its subsidiaries for the period January 1, 1958, to December 31, 1962, and determined deficiencies accordingly. This allocation was premised on the theory that this portion of the premiums constituted compensation actually earned by petitioner finance companies for selling and processing the credit life insurance. (Pet. (No. 390) App. A 10-11.) For

protective purposes, the Commissioner alternatively asserted deficiencies against Guardian and Beneficial by means of a similar allocation of premium income, for the period July 1, 1958, to December 31, 1962 (Pet. (No. 390) App. C 40-41).[2]

Both the Tax Court (Pet. (No. 390) App. C 20-63) and the court of appeals (Pet. (No. 390) App. A 7-18) upheld the Commissioner's primary determination that one-half of the premium income was allocable to petitioner finance companies. Accordingly, they had no occasion to consider the Commissioner's alternative allocation to Guardian and Beneficial.[3]

ARGUMENT

The issue presented was correctly decided by both courts below. There is no conflict of decisions or any other basis for further review by this Court.

1. Section 482 of the 1954 Code provides that the Commissioner may "allocate gross income" between "two or more organizations, trades, or businesses * * * owned or controlled directly or indirectly by

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[2] No allocation to Guardian and Beneficial was made with respect to the period January 1 to June 30, 1958, since those corporations had already included in their income the commissions received during that period (Pet. (No. 390) App. C 40-41).

[3] The alternative allocation is the subject of the protective petition for a writ of certiorari in *Commissioner* v. *Guardian Agency, Inc. and Beneficial Agency, Inc.*, No. 390, pending this Term. If the instant petition for certiorari is denied, the Commissioner will seek to have his protective petition dismissed pursuant to Rule 60

the same interests," "if he determines that such * * * allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any such organizations, trades, or businesses." The purpose of this provision is "to deny [taxpayers] the power to shift income * * * among controlled corporations, and to place such corporations rather on a parity with uncontrolled concerns." *Central Cuba Sugar Co.* v. *Commissioner*, 198 F. 2d 214, 216 (C.A. 2). In applying Section 482, the applicable standard is "that of an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer." Treasury Regulations Section 1.482-1(b)(1) (Pet. 4). Accordingly, the statute empowers the Commissioner to examine transactions between controlled taxable entities in order to determine whether they would have been consummated in arm's length negotiations between strangers and to make an allocation when they fail to meet that standard. *Eli Lilly and Co.* v. *United States*, 372 F. 2d 990, 1000 (Ct. Cl.); *Oil Base, Inc.* v. *Commissioner*, 362 F. 2d 212, 214 (C.A. 9), certiorari denied, 385 U.S. 928; *Hall* v. *Commissioner*, 294 F. 2d 82 (C.A. 5); *Simon J. Murphy Co.* v. *Commissioner*, 231 F. 2d 639 (C.A. 6).

Because the Commissioner has been given broad discretion to allocate income under Section 482, such a determination "is essentially one of fact and * * * must be affirmed if supported by substantial evidence." *Advance Machinery Exch.* v. *Commissioner*, 196 F. 2d 1006, 1007-1008 (C.A. 2). Given the broad power accorded the Commissioner under the statute, the courts have uniformly held that a Sec-

tion 482 allocation should not be set aside unless clearly shown to be unreasonable, arbitrary and capricious. *Spicer Theatre, Inc.* v. *Commissioner*, 346 F. 2d 704 (C.A. 6); *Rooney* v. *United States*, 305 F. 2d 681 (C.A. 9); *Grenada Industries, Inc.* v. *Commissioner*, 17 T.C. 231, 255, affirmed, 202 F. 2d 873 (C.A. 5), certiorari denied, 346 U.S. 819. Further review of the factual question decided adversely to petitioners by the two courts below consequently is unwarranted. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214; *Rudolph* v. *United States*, 370 U.S. 269, 271.

The evidence in this case amply supports the Tax Court's conclusion and the court of appeals' affirmance that, under the circumstances, "the Commissioner's allocation of only 50 percent of the net premiums to the * * * [petitioners was] reasonable" (Pet. (No. 390) App. A 13).[4] Common to the periods before and after July 1, 1958, is the undisputed fact that employees of the petitioners performed all of the services incident to the sale of the insurance. They wrote the policies, collected the premiums and deposited them in bank accounts of Guardian and Beneficial, made refunds, prepared the necessary papers in the event of the death of an insured debtor, and made weekly reports to Guardian and Beneficial, which collated and transmitted information and pre-

[4] Because of the interlocking relationship among petitioners, Guardian and Grand National, there is no doubt, and petitioners do not contest the fact, that these corporations were controlled by the same interests within the meaning of Section 482.

miums to the independent insurer. Since it is common industry practice for life insurance companies to pay commissions to a lender which performs such services, petitioners would have received commission income in any arm's length arrangement.[5] The formal diversion of this commission income to Guardian and Grand National, first by the assignment and then by the reinsurance arrangement, scarcely can mask the fact that petitioners earned this income, controlled its disposition, and continued to benefit from it through the interlocking shareholder relationship of the various corporate entities. Indeed, the use of Section 482 in a so-called "captive insurance company" case like this one was specifically approved by Congress in connection with the Life Insurance Company Tax Act of 1955, c. 83, 70 Stat. 36. Both of the Congressional Committees observed that Section 482 provided the Commissioner with "ample regulative authority to deal with this problem." S. Rep. No. 1571, 84th Cong., 2d Sess., p. 8 (1956-1 Cum.

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[5] Petitioners' assertion (Pet. 15) that their income would not have been any greater if Guardian and Grand National were unrelated corporate entities dealing with them at arm's length and that the Tax Court made no finding to the contrary cannot stand analysis. The Tax Court specifically found that a portion of the reinsurance premiums received by Grand National (Pet. (No. 390) App. C 49) "in reality constituted commission income which the finance companies had earned and which they gratuitously diverted to [Grand] National." This finding was supported by the testimony of an officer of the independent insurer who stated that (Pet. (No. 390) App. C 49 n. 15) "one of the purposes [of the reinsurance arrangement] was to create a legal vehicle to enable us to pay compensation in connection with the procurement of the insurance."

Bull. 967, 971-972); H. Rep. No. 1098, 84th Cong., 1st Sess., p. 7 (1956-1 Cum. Bull. 954, 958). Since Guardian received 56 percent of the premiums from January 1 to June 30, 1958, and Grand National received 58.4 percent of the premiums (of which 8.4 percent was found to constitute adequate compensation for the reinsurance risk) for the subsequent period, the Commissioner's allocation of 50 percent of the premiums to petitioners was in accord with the substance of the transaction and was eminently reasonable.[6]

2. Petitioners' principal contention (Pet. 11-14) is that because Indiana law appears to have precluded them from receiving commission income from credit life insurance,[7] the Commissioner's allocation under Section 482 was unreasonable. It is firmly established, however, that unless a federal taxing statute is dependent upon state law, federal criteria are to be applied in determining tax consequenecs under that statute. *Burnet* v. *Harmel*, 287 U.S. 103, 110; *Lyeth* v. *Hoey*, 305 U.S. 188, 194; *Morgan* v. *Com-*

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[6] Considerable tax savings were realized by having this commission element of the net premiums reported as the income of Grand National because it enjoyed the favorable tax treatment granted insurance companies. See Sections 802(a), 804, 809, and 815, Internal Revenue Code of 1954. The findings of the Tax Court indicate (Pet. (No. 390) App. C 39) that Grand National's effective tax rate on the gross premiums received during the years involved averaged approximately 20 percent.

[7] Indiana law apparently forbids finance companies from receiving any income other than interest from loans (see 5 Burns Indiana Statutes Annotated, Sec. 18-3002), but there has been no judicial interpretation of this statute.

missioner, 309 U.S. 78, 80; *cf. Biddle* v. *Commissioner*, 302 U.S. 573, 578-579. The crucial question under Section 482 has nothing whatever to do with state law. It is whether petitioners, Guardian, and Grand National would have entered into the same arrangements had they been uncontrolled corporations dealing at arm's length. Clearly, as both courts below held (Pet. (No. 390) App. A 12-14, App. C 46-50), petitioners would not have allowed an independent third party to retain approximately 58 percent of the premium income, as did Guardian and Grand National. The only reason that such an arrangement was countenanced by petitioners was because Guardian and Grand National were commonly controlled corporate entities. The fact that the arrangements devised by petitioners might have satisfied the requirements of Indiana law by circumventing the prohibition against direct receipt by petitioners of commission income does not prevent the Commissioner from exercising his prerogative under Section 482 and allocating income to the corporate entities which in fact earned it to reflect income clearly. Cf. *National Securities Corp.* v. *Commissioner*, 137 F. 2d 600, 602 (C.A. 3).

Contrary to petitioners' suggestion (Pet. 13), there is no analogy between this case and *Poe* v. *Seaborn*, 282 U.S. 101. First, *Seaborn* did not involve the plenary power granted the Commissioner under Section 482. Second, the state laws applicable in the two cases are wholly different. In *Seaborn*, Washington's community property law provided that a wife was the owner of one-half of her husband's

income, whether or not her efforts contributed to the earning of that income. The Indiana statute upon which petitioners rely did not, as the community property law did in *Seaborn*, affirmatively vest the commission income in Guardian and Grand National. The latter received this income not as a matter of law but only as a result of petitioners' contractual arrangements which diverted such income to them.* *Cf. Lucas* v. *Earl*, 281 U.S. 111; *Kimbrell* v. *Commissioner*, 371 F. 2d 897, 902 (C.A. 5). The possibility that petitioners may not have been able to assert valid title to the income under state law should not control the tax consequences of the transactions, since "taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid." *Corliss* v. *Bowers*, 281 U.S. 376, 378. Whatever success the parties may have achieved in satisfying the formal requirements of local law, the commission element of the premiums was earned by and was, in substance, under the control of petition-

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* *L. E. Shunk Latex Products, Inc.* v. *Commissioner*, 18 T.C. 940 (Pet. 16-17), also is distinguishable. In that case, the Tax Court held that an allocation under the predecessor provisions of Section 482 was improper because the price charged by the taxpayer to a controlled buyer was fixed by O.P.A. limits. Unlike the situation in *Shunk*, where the taxpayer charged its controlled buyer the same price it would have charged an unrelated buyer, the courts below found on the facts of this case that the arrangements made by petitioners with respect to premium income would not have been made with independent third parties. In short, it was the fact that the O.P.A. price in *Shunk* was the *de jure* arm's length price that rendered Section 482 inapplicable.

ers because shareholders owning in excess of 70 percent of the stock of Local Finance owned 99 and 100 percent of the stock of Grand National and Guardian, respectively.[9]

The significance of this common control is graphically underscored by the fact that substantial dividends ($267,044) were paid by Grand National to its shareholders (essentially the shareholders of Local Finance) during the years involved (Pet. (No. 390) App. C 39). While the interlocking relationship devised might have been necessary and sufficient to pass muster under the Indiana statute, the very fact of common control of the corporate parties caused the arrangements in question to be scrutinized under Section 482—the purpose of which is to insure that transactions among controlled businesses are treated in accordance with their substance and not with their form. To permit Indiana law to dictate the outcome of this case, as petitioners urge, would compel the Commissioner to accord substantive tax reality to arrangements which petitioners devised only to comply with state law requirements based on policy considerations wholly different from those of Section 482. Both courts below thus were correct in refusing to hold such state law considerations controlling.

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[9] Petitioners claim (Pet. 21-22) that Section 482 is inapplicable because they were in a position to earn commissions and simply chose not to do so. The courts below specifically found, however, that petitioners did indeed earn the income allocated to them by the Commissioner because their employees sold and processed the policies (Pet. (No. 390) App. A 14, App. C 46-47).

3. None of the authorities cited by petitioners (Pet. 16-22) are in conflict with the decision below. In many of those cases, an individual corporate officer, rather than the corporation itself, was found to have earned commission income.[10] In others, the Commissioner's determination was not premised upon a Section 482 allocation.[11] While both *Nichols Loan Corp. of Terre Haute* v. *Commissioner*, 321 F. 2d 905 (C.A. 7), reversing decision of June 22, 1962 (21 T.C.M. 805), and *Campbell County State Bank, Inc. of Herreid, S.D.* v. *Commissioner*, 311 F. 2d 374 (C.A. 8) (Pet. 20), involved similar sales of credit life insurance, there was no finding in *Nichols* that the controlled insurance company had not earned the commissions and no reference to Section 482 in the opinion of the Tax Court or that of the Seventh Circuit. Similarly, there was no finding in *Campbell* that the finance companies earned commission income

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[10] *Moke Epstein, Inc.* v. *Commissioner*, 29 T.C. 1005; *Ray Waits Motors* v. *United States*, 145 F. Supp. 269 (E.D. S.C.); *Gaddy Motor Co., Inc.* v. *Commissioner*, decided October 31, 1958 (27 T.C.M. 815); *Jaegar Motor Car Co.* v. *Commissioner*, 284 F. 2d 127 (C.A. 7), certiorari denied, 365 U.S. 860; *Crowley* v. *Commissioner*, 34 T.C. 333; and *Alabama-Georgia Syrup Co.* v. *Commissioner*, 36 T.C. 747, reversed on another issue *sub nom. Whitfield* v. *Commissioner*, 311 F. 2d 640 (C.A. 5). (Pet. 20, 22.)

[11] *Teschner* v. *Commissioner*, 38 T.C. 1003; *Alinco Life Insurance Co.* v. *United States*, 373 F. 2d 336 (Ct. Cl.); *First Security Bank* v. *United States*, 213 F. Supp. 362 (Mont.), affirmed, 334 F. 2d 120 (C.A. 9); and *First State Bank* v. *United States* (S.D.), decided June 25, 1962 (62-2 U.S.T.C., par. 9613). (Pet. 13, 20, 21.)

by performing the services of selling and processing credit insurance.[12]

4. With respect to the administrative importance of this case, it is significant that petitioners, in their generalized assertion (Pet. 18-19) that a vast number of cases are pending in the courts concerning allocations of income among insurance companies, finance companies, and their shareholders, do not hazard any statement as to how those allocations relate to the decision below. Indeed, petitioners have presented an inflated and misleading list of pending cases. By citing docket numbers instead of cases (Pet. 24-36), petitioners show a pending "case" for each of the multiple parties for each taxable year. The amounts alleged to be in issue are similarly exaggerated since, by their own admission (Pet. 19), petitioners' figures include the alternative allocations made by the Commissioner to protect the revenues in the event that his primary allocation is not sustained. Moreover, petitioners' figures fail to reflect that the deficiencies arising from the Commissioner's allocations of commission income to finance companies

[12] There is also no basis for petitioners' contention (Pet. 19, n. 3, 4) that the decision below is in conflict with *Moline Properties, Inc.* v. *Commissioner*, 319 U.S. 436; *National Carbide Corp.* v. *Commissioner*, 336 U.S. 422; or *Gregory* v. *Helvering*, 293 U.S. 465. We do not quarrel with the general proposition that taxpayers are free to structure their business affairs in order to minimize their tax liability. But the transactions at issue could have been arranged so that Grand National's and Guardian's employees performed sufficient services to warrant payment of the commissions to those entities. The fact that they did not do so provides ample justification for the Commissioner's Section 482 allocation.

would be offset in part by reductions in the commission income of "captive insurance companies." In any event, measurement of the administrative importance ends, as it begins, not with petitioners' assertion (Pet. 22) that this case raises "some of the most difficult and fundamental issues in federal tax law," but rather with recognition that an essentially factual question is presented. Further review by this Court consequently is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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